WELLTON-MOHAWK IRRIGATION AND DRAINAGE DISTRICT

IBLA 83-930 Decided March 20, 1984

Appeal from determination of the Yuma District Office, Bureau of Land Management, requiring a full fair market rental for right-of-way A 10108.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Fees -- Rights-of-Way: Federal Land Policy and Management Act of 1976

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g), indicates that under certain circumstances the Secretary of the Interior may charge less than fair market value for annual right-of-way rental, including no charge. However, no reduction or waiver of the fee based on fair market rental will be made if the right-of-way user is a cooperative or similar organization whose principal source of revenue is customer charges.

APPEARANCES: C. L. Gould, Manager, Wellton-Mohawk Irrigation and Drainage District, for the District; Lawrence A. McHenry, Esq., Office of the Solicitor, Department of the Interior, Phoenix, Arizona, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On May 11, 1983, the Wellton-Mohawk Irrigation and Drainage District filed an application to amend its existing right-of-way A-10108 for a communication site to add certain communications equipment. By decision dated July 8, 1983, the District Manager of the Yuma District Office, Bureau of Land Management (BLM), notified Wellton-Mohawk that the reports on the application were favorable and that the permit would issue upon the payment of a $10 filing fee and advance rental. With respect to the latter, the decision stated only:

> As a result of changes to 43 CFR 2803.1-1 in 1980 and subsequent Solicitor's opinions on waiver of rental fees to municipal utilities and cooperatives we must require full fair market rental as determined by appraisal on your communication site on Telegraph Peak. We may issue the permit prior to an appraisal it the following statement is made in writing by the authorized officer:

> "I request the permit be issued prior to the completion of the Bureau of Land Management's appraisal. I agree to pay BLM, upon demand, those fees determined in the appraisal to represent the fair market rental for the use of the public lands involved in the subject of right-of-way permit."
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> If you desire the permit be issued prior to appraisal, please include this statement with a minimum advance rental payment of . . . . $100.00. [1/]

Wellton-Mohawk paid the advance rental under protest so that the permit would issue and filed a timely notice of appeal to the Board. It objected to the rental payment because it believed that it was covered by section 504(g) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1764(g) (1976), which provides for a discretionary waiver of rental fees for certain public agencies serving public interests. 2/

Wellton-Mohawk reports that it is organized as a political subdivision under Arizona law for the purpose of a Federal reclamation project and drainage district and that it has a contract with the United States for the formation of the reclamation project. It is a nonprofit organization serving the general public with water, power, drainage and flood control, and public television, as well as a program of emergency assistance in coordination with other public agencies.

The Field Solicitor, on behalf of BLM, responds that under 43 CFR 2803.1-2(c), 3/ a nonprofit electric distribution cooperative whose principal

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1/ 43 CFR 2803.1-1 deals with the reimbursement of administrative and other costs incurred by the United States in processing right-of-way applications, not rental fees. The appropriate regulation for discussion is 43 CFR 2803.1-2.

2/ Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), provides in applicable portion:

"(g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest."

3/ 43 CFR 2803.1-2(c) states:

"(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

"(1) When the holder is a Federal, State, or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

source of revenue is customer charges is not eligible for an exemption or reduction of the fair market rental for a right-of-way under FLPMA. He argues that the free use of a Government right-of-way is restricted to agencies of the Federal Government and to situations where the rental charge is a token amount and the cost of collection unduly large. He points out that the preamble to the regulations when proposed for comment expressly eliminated Rural Electrification Administration (REA) cooperatives from consideration for reduced charges under 43 CFR 2803.1-2(c). See 44 FR 58112 (Oct. 9, 1979). The Field Solicitor reminds the Board that it has already considered this issue and held that the Secretary of the Interior, through promulgation of regulations, has expressed the intent to charge fair market rental to cooperatives whose principal source of revenue is customer charges even though such cooperatives are nonprofit corporations. See, e.g., San Miguel Power Association, 64 IBLA 342 (1982); Tri-State Generation & Transmission Association, 63 IBLA 347, 89 I.D. 227 (1982).

[1] The issue in this appeal is whether appellant qualifies for either no rental or a reduced fee under section 504(g) of FLPMA and 43 CFR 2801.1-2(c). In Tri-State Generation & Transmission Association, supra, we held that free use is restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large. 4/ We also found that the exclusionary language of 43 CFR 2803.1-2(c) eliminates from consideration for reduced charges under any category of 43 CFR 2803.1-2(c) cooperatives whose principal source of revenue is customer charges. Since that decision, the Board has repeatedly reaffirmed and followed these rulings. See, e.g., San Miguel Power Association, 71 IBLA 213 (1983); Northern Electric Cooperative, Inc., 66 IBLA 121 (1982); Socorro Electric Cooperative, Inc., 64 IBLA 65 (1982). In Big Horn Canal Association, 76 IBLA 283 (1983), the Board extended its rulings to a nonprofit irrigation cooperative organized in Wyoming.

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fn. 3 (continued)
"(2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.
"(3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary."

4/ This interpretation was based on the legislative history of section 504(g) of FLPMA, supra:

> "Subsection (f). This subsection provides that no right-of-way shall be issued for less than 'fair market value' as determined by the Secretary. The proviso at the end of the subsection qualifies this standard where the applicant is a State or local government or a nonprofit association. In this case, the right-of-way may be granted for such lesser charge as the Secretary determines to be equitable under the circumstances. However, it is not the intent of this Committee to allow use of national resource land without charge except where the holder is the Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return to be received."

S. Rep. No. 583, 94 Cong., 1st Sess. 72-73 (1975) (emphasis added).

Appellant is not an agency of the Federal Government, the rental charge is not token, and BLM obviously has determined that the cost of collection is not unduly large. 5/ Therefore, appellant is not entitled to a total exemption from rental fees.

The question to be addressed is whether appellant is a municipal utility or cooperative whose principal source of revenue is customer charges. In applying the regulation in its earlier cases, the Board has been guided by the Department's discussion of comments on the regulation as proposed. It is useful to set out that discussion here.

> [FLPMA] provides discretionary authority to charge less than fair market value, including free use, to certain governmental and non-profit entities or where a valuable benefit is provided to the public or the programs of the agency without or at reduced charges. The House Report indicated the committee considered and supported long time agency policy of providing special price considerations favoring State and local governments and non-profit organizations. The Senate Report states ". . . it is not the intent of this committee to allow use of . . . land without charge except where the holder is the Federal Government itself. . . ."
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> Failure to charge fair market value provides a subsidy by all the public. It follows that free or lesser charges should be used only in those circumstances where all the public benefits from the use. Non-profit entities that are essentially tax or donation supported and which are engaged in a public or semi-public activity designed for the public health, safety or welfare will qualify for lesser charges. As a matter of equity, we believe it is inappropriate to charge lesser fees or grant free use when the holder is engaged in similar business and follows practices comparable to private commercial enterprise. For this reason, REA cooperatives and municipal utilities whose principle [sic] source of revenue is customer charges will, hereafter, be charged fair market value fees. In view of wide variations in organization, purpose and manner of doing business, it is impractical to attempt to interpret in the regulations each and every circumstance that may or may not qualify for fee reductions. Fair and equitable application will rest with the authorized officer. Uniformity will be achieved through Manual guidance and training. Decisions on charges are appealable.

Under Arizona law, appellant is considered to be a municipal corporation organized to provide for the irrigation and drainage of the lands within the designated district. Ariz. Rev. Stat. Ann. §§ 45-1501, 45-1503, 45-1505 (1956).

5/ Counsel for BLM states that the rental in this case is token but that the cost of collection is not unduly large. The actual rental charge has not been calculated but, as noted, BLM demanded a $100 minimum advance payment. We are not sure that the rental should be characterized as token and we do not decide this question.

Appellant was particularly organized for the purpose of a Federal reclamation project. See Notice of Appeal, Resolution of Formation at 9. See also Ariz. Rev. Stat. Ann. § 45-1691 (1956). The character of irrigation districts under state law has been described by the Supreme Court of Arizona as follows:

> [I]rrigation districts and similar public corporations, while in some senses subdivisions of the state, are in a very different class. Their function is purely business and economic, and not political and governmental. They are formed in each case by the direct act of those whose business and property will be affected, and for the express purpose of engaging in some form of business, and not of government. The power of incurring obligations of any nature is ultimately left in the hands of those whose property is affected thereby.
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> Districts of the kind involved in this proceeding therefore belong to that class of organizations, once rare but becoming more and more common, established for the pecuniary profit of the inhabitants of a certain territorial subdivision of the state, but having no political or governmental purposes or functions. In some respects these organizations are municipal in their nature, for they exercise the taxing power, the greatest attribute of sovereignty, and can compel the inclusion of unwilling landholders within their bounds. In other ways they resemble private corporations, for they are liable for the torts of their servants in the same manner and to the same extent, and indeed generally have the same rights and responsibilities. Probably the best definition we can give then is to say that they are corporations having a public purpose, which may be vested with so much of the attributes or sovereignty as are necessary to carry out that purpose, and which are subject only to such constitutional limitations and responsibilities as are appropriate thereto.

Taylor v. Roosevelt Irrigation Dist., 232 P.2d 107, 108-09 (Ariz. 1951), quoting from Day v. Buckeye Water Conservation & Drainage Dist., 237 P. 636, 638 (Ariz. 1925), and Maricopa County Municipal Water Conservation Dist. No. 1 v. La Prade, 40 P.2d 94, 100 (Ariz. 1935). See also Enloe v. Baker, 383 P. 2d 748, 752 (Ariz. 1963).

Arizona law requires that the board of directors of an irrigation district annually estimate its financial requirements for the coming fiscal year and assess the taxable lands in the district on a pro rata per acre basis for the funds to meet those requirements. The taxes are assessed to the same person to whom the state and county taxes are assessed and at the same time and same manner as the levy of state and county taxes. Ariz. Rev. Stat. Ann. §§ 45-1712, 45-1714 (Supp. 1983). The board also has authority to levy special district assessments for the purpose of paying or refunding district indebtedness; repairing, improving, extending, maintaining, and operating existing irrigation works; installing new works or systems; or meeting emergencies. Ariz. Rev. Stat. Ann. § 45-1751 (1956).

In addition to the above described authority to appropriate money to pay district debts and expenses, a district board may "[e]stablish tolls or

charges for service of irrigation, domestic water, electricity and other commodities." Ariz. Rev. Stat. Ann. § 45-1578(10) (1956). The degree to which a district does establish service charges is apparently left to the "practice of the district." This is illustrated by the statutory provision concerning the distribution of water, Ariz. Rev. Stat. Ann. § 45-1588 (1956):

> A. Subject to the law of priority, all water of the district available for distribution shall be apportioned to the lands thereof pro rata but when water costs are, under the practice of the district, defrayed by a water tax, the board may withhold water service from any parcel of land under such rules and regulations as it promulgates, pending payment of the water tax assessed against such parcel of land.
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> B. The board may provide that charges for water service shall become a lien upon the land served until paid in full.

The foregoing illustrates the difficulty in application of the BLM regulation. Although we find that appellant is a municipal utility or cooperative, we also find that appellant may be characterized both as a nonprofit entity that is tax supported and which is engaged in public or semipublic activity designed for the public health, safety, or welfare, and as an entity engaged in a similar business and following practices comparable to a private commercial enterprise. Thus, we conclude that the decision in this case turns on whether the district's "principal source of revenues is customer charges."

The BLM decision provides no analysis of the rental charge regulations as applied to appellant. BLM apparently relied on analysis requiring cost recovery reimbursement under 43 CFR 2803.1-1(a)(2)(i)(A) and finding that there could be no waiver of rental fees under 43 CFR 2803.1-2(c)(3) for a California irrigation district which charges for its services. There is no documentation establishing that California and Arizona irrigation districts are organizationally the same. Similarly, counsel for BLM casts his arguments in terms of REA cooperatives, which appellant is not.

This Board requested that appellant submit an annual report reflecting its revenue sources or a comparable document. Appellant has submitted a statement of its revenue and expense accounts for December 1981, which includes annual data. The report is divided into three divisions: General administrative, irrigation, and power. The budgeted monthly revenue figure for the general administrative division is $3,375 consisting primarily of an item labeled "District Housing Rents" ($2,916.67). The budgeted monthly amount for the irrigation division revenue account is $215,096.42, the largest portion of which is "Regular Assessment -- O&M" ($160,382.50). The power division budgeted revenue account reflects revenues from sales, less sales tax, of $177,000. Appellant has made no attempt to further define these revenue accounts for the Board. On the assumption that sales revenues would equate to customer charges, we find that a principal source of appellant's revenue does come from customer charges and thus appellant must pay the fair market value for right-of-way A-10108.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Yuma District Office, BLM, is affirmed.

Will A. Irwin
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge